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UNITED STATES DISTRICT COURT FOR THE  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

WENYING LI,  
 XU CHEN,  
  
 Plaintiffs,  
  
 v.

No.

MICHAEL CHERTOFF, SECRETARY,  
 DEPARTMENT OF HOMELAND  
 SECURITY; DEPARTMENT OF  
 HOMELAND SECURITY, JONATHAN  
 SCHARFEN, ACTING DIRECTOR,  
 USCIS; U.S. CITIZENSHIP AND  
 IMMIGRATION SERVICES; GERARD  
 HEINAUER, DIRECTOR, USCIS  
 NEBRASKA SERVICE CENTER;  
 LYNNE SKEIRIK, DIRECTOR,  
 U.S. DEPARTMENT OF STATE,  
 NATIONAL VISA CENTER,  
  
 Defendants.

COMPLAINT FOR A WRIT OF  
 MANDAMUS AND DECLARATORY  
 AND INJUNCTIVE RELIEF

USCIS Agency Numbers:  
 79-610-396 (Wenying Li)  
 97-123-355 (Xu Chen)

**COMPLAINT FOR A WRIT OF MANDAMUS AND DECLARATORY  
 AND INJUNCTIVE RELIEF**

By and through their undersigned attorney, Plaintiffs, WENYING LI (“Ms. Li”) and XU  
 CHEN (“Xu”), as and for their complaint, allege as follows:

**PRELIMINARY STATEMENT**

1. Ms. Li is a native and citizen of China who has been granted asylum in the  
 United States. More than two years ago, Ms. Li filed petitions to confer derivative asylee

benefits on her husband, Desen Chen, and son, Xu Chen, with the U.S. Citizenship and Immigration Services (“USCIS,” formerly the Immigration and Naturalization Service).<sup>1</sup> The USCIS approved those petitions on October 18, 2006. To date, the American Embassy in Guangzhou, China, has not issued a travel document to Ms. Li’s son, who remains alone in China, separated from his family. This action seeks to compel USCIS to issue a travel document to Xu, pursuant to Ms. Li’s approved I-730 petition.<sup>2</sup>

### **JURISDICTION**

2. Jurisdiction over the subject matter of this civil action is conferred on this Court by 28 U.S.C. § 1331, as a civil action arising under the Constitution, laws, or treaties of the United States; 28 U.S.C. § 1361, as a civil action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to Plaintiffs; 5 U.S.C. § 702, as a challenge to agency action under the Administrative Procedure Act (“APA”); and 28 U.S.C. §§ 2201 and 2202, as a civil action seeking, in addition to other remedies, a declaratory judgment.

### **VENUE**

3. Venue is properly in this district pursuant to 28 U.S.C. §§ 1391(e)(2) and (e)(3), because a substantial part of the events giving rise to this claim occurred in this district, Ms. Li resides in this district, and no real property is involved in this action.

### **INTRA DISTRICT ASSIGNMENT**

4. Because a substantial portion of the events that gave rise to this lawsuit occurred in the County of San Francisco, this case should be assigned to the Court’s San Francisco division.

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<sup>1</sup> Pursuant to the *Department of Homeland Security Reorganization Plan, Homeland Security Act of 2002*, Pub. L. No. 107-296, 116 Stat. 2135 (2002), 6 U.S.C. §§ 101-557, as of March 1, 2003, the INS was abolished and its functions were transferred to the U.S. Citizenship and Immigration Services (“USCIS”) within the Department of Homeland Security (“DHS”).

<sup>2</sup> The Receipt Number assigned by the USCIS to the I-730 petition filed by Ms. Li on behalf of her son is LIN-06-082-52066.

## STANDING

5. The APA affords a right of review to a person who is “adversely affected or aggrieved by agency action.” 5 U.S.C. § 702. Defendants’ illegal action has immeasurably prolonged the separation of the Xu from his immediate family members. Plaintiffs thus fall within the APA’s standing provisions. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State, Bureau of Consular Affairs*, 45 F.3d 469, 471-72 (D.C. Cir. 1995), *reh’g denied*, 74 F.3d 1308 (D.C. Cir.), *vacated on other grounds*, 117 S. Ct. 378 (1996); *see also, Abourezk v. Reagan*, 785 F.2d 1043, 1050-51 (D.C. Cir. 1986).

## PLAINTIFFS

6. Wenying Li is a native and citizen of China who currently resides at 2210 Turk Street, Apt. #3, San Francisco, CA 94118. On July 21, 2003, the San Francisco Immigration Court granted Ms. Li asylum on a conditional basis pursuant to the Coercive Population Control Program (“CPC”). The condition on the grant of asylum was removed and Ms. Li was granted asylum as of November 16, 2005, pursuant to Section 101(g)(2) of the REAL ID Act of 2005, Pub.L. 109–13 (May 11, 2005). On or about January 24, 2006, she petitioned the USCIS, on Forms I-730, to confer derivative asylee status on her husband and son. Although the USCIS approved those petitions on October 18, 2006, it has inexplicably failed to issue a travel document to her son, Xu Chen, the derivative plaintiff.<sup>3</sup>

7. Xu Chen, a native and citizen of China, is Ms. Li’s son. He presently resides at 29 Yuan Tian Cun, District Chang Dong, Taishan City, Guangdong, China. He has been unable to join his parents in the United States because of the USCIS’s inexplicable delay in issuing him a travel document.

## DEFENDANTS

8. Michael Chertoff is the Secretary of the Department of Homeland Security, the executive department which contains the USCIS, and is sued herein in his official capacity.

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<sup>3</sup> The I-730 petition filed by Ms. Li on behalf of her husband was also approved on or about October 18, 2006; Ms. Li’s husband is in the United States and thus does not require a travel document.

1 Defendant Chertoff is charged with the administration and enforcement of the Immigration and  
 2 Nationality Act pursuant to INA § 103(a), 8 U.S.C. § 1103(a).

3 9. The Department of Homeland Security is the federal agency encompassing the  
 4 USCIS, which is responsible for the administration and enforcement of the INA and all other  
 5 laws relating to the immigration and naturalization of non-citizens.

6 10. Jonathan Scharfen is the Acting Director of USCIS and, as such, has been  
 7 delegated the authority to direct the administration of the USCIS, and to enforce the INA and all  
 8 other laws relating to the immigration and naturalization of non-citizens. Defendant Scharfen is  
 9 sued herein in his official capacity.

10 11. The United States Citizenship and Immigration Services (USCIS) is the federal  
 11 agency within the Department of Homeland Security that is responsible for the administration  
 12 and enforcement of the Immigration and Nationality Act ("INA") and all other laws relating to  
 13 the immigration and naturalization of non-citizens.

14 12. Gerard Heinauer is the Director of the USCIS Nebraska Service Center and is  
 15 sued in his official capacity.

16 13. Lynne Skeirik is the Director of the U.S. Department of State's National Visa  
 17 Center and is sued in her official capacity.

### 18 FACTS

19 14. In enacting the Refugee Act of 1980, Congress expressed its commitment to the  
 20 "historic policy of the United States to respond to the urgent needs of persons subject to  
 21 persecution in their homelands." *Refugee Act of 1980*, Pub. L. No. 96-212, 94 Stat. 102 (1980).  
 22 A priority of this policy was the preservation and protection of the families of people granted  
 23 asylum in this country. The INA provides that a spouse or child of an asylee "may . . . be granted  
 24 the same status as the [asylee] if accompanying, or following to join, such alien." INA §  
 25 208(b)(3) [8 U.S.C. § 1158(b)(3)]; *see generally* 8 C.F.R. § 1208.21.

26 15. USCIS regulations outline the procedures that must be followed for an asylee to  
 27 petition for a spouse and/or children who are outside the United States. For each family member,  
 28 the asylee must file a Refugee/Asylee Relative Petition (Form I-730) with the USCIS, "setting

1 forth the full name, relationship, date and place of birth, and current location of each [qualifying  
2 family member].” 8 C.F.R. § 1208.21(d).

3 16. Once the USCIS approves the petition, it forwards the petition to the Department  
4 of State’s National Visa Center “for delivery to the American Embassy or Consulate having  
5 jurisdiction over the area in which the asylee’s spouse or child is located.” 8 C.F.R. §  
6 1208.21(d). Officers of the USCIS at the American Embassy then have the ministerial duty of  
7 issuing travel documents to the beneficiaries of the approved I-730 petitions.

8 17. This lawsuit arises out of Defendants’ illegal delay of nearly two (2) years in the  
9 issuance of a refugee travel document to Xu.

10 18. Ms. Li was born on May, 7, 1956 in Guangdong, China. After fleeing China and  
11 arriving in the United States, Ms. Li filed an application for asylum and, on July 21, 2003, the  
12 San Francisco Immigration Court granted asylum on a conditional basis pursuant to the Coercive  
13 Population Control Program. The condition on the grant of asylum was removed and Ms. Li was  
14 granted asylum as of November 16, 2005, pursuant to the REAL ID Act of 2005.

15 19. On or about January 24, 2006, Ms. Li filed I-730 Refugee/Asylee Relative  
16 Petitions with the USCIS Nebraska Service Center (“NSC”) on behalf of her husband, who was  
17 in the United States, and her son, who is in China. *See* 8 C.F.R. § 1208.21. On October 18,  
18 2006, the NSC approved both petitions. Xu’s I-730 was then forwarded to the Department of  
19 State National Visa Center on October 25, 2006. To date, however, Xu has not been issued a  
20 travel document.

21 20. Since that time, Ms. Li has taken exhaustive steps to compel Defendants to  
22 issue a travel document to her son. Ms. Li, through counsel, emailed USCIS in Guangzhou,  
23 China on December 19, 2007 to request that her son’s case be expedited. USCIS in Guangzhou,  
24 China responded to that email, indicating that Xu’s case was pending for an interview, but  
25 indicated that since there was more than one beneficiary, it wanted to group all the family  
26 members together for an interview. The email requested a statement from Ms. Li about the  
27 multiple beneficiaries. Ms. Li, through counsel, faxed a cover letter with a signed declaration, to  
28 the USCIS officer in Guangzhou, China, as requested. Ms. Li explained that her husband had

1 entered the United States on a B-2 visa on June 25, 2001 and has resided in the United States  
2 since that time, as was indicated on his I-730 application, while her son resides in China, as  
3 indicated on his I-730 application. The letter again requested that Xu's case be expedited since  
4 he has been separated from his parents for over five years. Neither Ms. Li nor her son, Xu, have  
5 received a response to this letter from USCIS.

6 21. Despite Ms. Li's exhaustive steps, the USCIS has still not issued a travel  
7 document to Xu. As a result, Ms. Li remains separated from her son – who is alone in China –  
8 because the employees of the USCIS have unlawfully failed to issue a travel document to the  
9 derivative plaintiff.

10 22. Defendants' willful delay in issuing a travel document to Ms. Li's son  
11 clearly contravenes the USCIS's duty to process the approved family petition within a reasonable  
12 period of time. As a result of this delay, Ms. Li's son remains alone in China, separated from his  
13 parents.

14 23. This civil action seeks a writ of mandamus ordering Defendants to immediately  
15 issue a travel document to Xu.

16 24. Plaintiffs have exhausted any administrative remedies that may exist. No other  
17 remedy exists for Plaintiffs to resolve Defendants' refusal to comply with their regulatory  
18 obligations within a reasonable period of time.

19 25. Defendants' illegal action has kept Plaintiffs in separate countries without the  
20 ability to be reunited. Ms. Li's son cannot travel to the United States as a derivative asylee  
21 because of Defendants' illegal action.

22 26. Plaintiffs have suffered, and will continue to suffer, irreparable injury for which  
23 they have no adequate remedy at law. If the relief prayed for is not granted, Plaintiffs will suffer  
24 continued separation and extreme individual hardship.

25 **FIRST CAUSE OF ACTION**  
26 **(Mandamus)**

27 27. Plaintiffs repeat, allege, and incorporate paragraphs 1 through 26 above as though  
28 fully set forth herein.

28 28. Defendants have the nondiscretionary duty to issue a travel document to Ms. Li's

1 son within a reasonable period of time. By failing to do so, Defendants are, quite simply, failing  
2 to comply with their statutory and regulatory duties. Plaintiffs are entitled, therefore, to relief in  
3 the nature of mandamus pursuant to 28 U.S.C. § 1361 to compel Defendants to issue a travel  
4 document to Xu.

5 **SECOND CAUSE OF ACTION**  
6 **(Violation of the Administrative Procedure Act)**

7 29. Plaintiffs repeat, allege, and incorporate paragraphs 1 through 28 above as though  
8 fully set forth herein.

9 30. Plaintiffs are persons aggrieved by agency action under the Administrative  
10 Procedure Act, 5 U.S.C. §§ 701 *et seq.* By failing to issue the travel document to Xu, Defendants  
11 have acted arbitrarily and capriciously and have “unlawfully withheld or unreasonably delayed”  
12 agency action in violation of 5 U.S.C. § 706.

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**RELIEF REQUESTED**

WHEREFORE, Plaintiffs pray that this Court:

- (1) Accept jurisdiction over this action;
- (2) Declare Defendants' failure to issue a travel document to Xu Chen pursuant to Wenying Li's approved I-730 petition to be a violation of 8 C.F.R. § 1208.21 and the Administrative Procedure Act;
- (3) Order the USCIS to immediately issue a travel document to the derivative plaintiff;
- (4) Grant attorney's fees and costs of court under 28 U.S.C. § 2412, 28 U.S.C. § 1920, Fed. R. Civ. P. 54(d), and other authority; and
- (5) Grant such other and further relief as this Court deems just and proper under the circumstances.

DATED: July 23, 2008

Respectfully submitted,

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